No. 98-1509

In the

Supreme Court of the United States

OCTOBER TERM, 1998

COLUMBIA UNION COLLEGE,

Petitioner,

v.

EDWARD O. CLARKE, JR., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 10, 1999

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QUESTIONS PRESENTED

1. Is a remand order requiring the development of a complete factual record before deciding whether Columbia Union College is pervasively sectarian ripe for review or tantamount to excessive entanglement?

2. Should this Court depart from longstanding precedent barring direct State aid to the core educational programs of a pervasively sectarian institution in the absence of a factual record?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL AND STATUTORY PROVISIONS

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STATEMENT OF THE CASE

Petitioners seek review of a decision of the United States Court of Appeals for the Fourth Circuit vacating and remanding a grant of summary judgment in favor of the members of the Maryland Higher Education Commission. The panel majority determined that the district court erred in resting its conclusion that Columbia Union College is "pervasively sectarian" on an incomplete record and in considering the facts in the light least, rather than most, favorable to Columbia Union. Appendix to Petition for Writ of Certiorari (hereafter "App."__) at 33. At the same time, the court of appeals applied longstanding Establishment Clause decisions, including the recent case of

Agostini v. Felton, 117 S. Ct. 1997 (1997), that bar a direct transfer of State funds to a pervasively sectarian institution to fund its core educational functions. (App. 21.) The petition seeks to reverse this settled doctrine notwithstanding the lack of a factual record for review.

1. Proceedings Below.

In June 1996 the College filed this lawsuit challenging the Commission's refusal to reconsider its Secretary's denial in 1992 of the College's request for direct State aid under the Joseph Sellinger program. The Sellinger program, a grant program established in 1971 by the Maryland General Assembly, provides aid to qualifying non-public institutions of higher education, including three colleges that have some religious affiliation. *See* Md. Educ. Code Ann. §§ 17-101 *et seq*.

Although Columbia Union had not then filed a current application for State funds, it claimed an immediate injury because the Commission's counsel advised it on January 20, 1996, that the then-recent decision in *Rosenberger v. Rector and Bd. of Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), did not change the law prohibiting such aid. After the Commission moved to dismiss on ripeness grounds, the district judge obtained a stipulation that Columbia Union would apply for funds and that the Commission would consider its application on an expedited basis. The Commission developed a factual record and determined that the College was a pervasively sectarian institution not entitled to State funds.

On December 24, 1996, Columbia Union filed an Amended Complaint against Edward O. Clarke, Jr., the Commission's Chairman, and other Commission members in their official capacities (collectively "the Commission"). The parties filed cross-motions for summary judgment and the court granted summary judgment in favor of the defendants. On appeal the Fourth Circuit vacated and remanded the district court's order. The College filed its Petition for a Writ of Certiorari following denial of its

Petition for Rehearing and Suggestion for Rehearing en Banc.

2. The Statutory Scheme.

The Commission administers the Sellinger program by, among other things, determining which institutions are eligible for aid, *id.* §17-103; computing the aid to which an institution is entitled, *id.*, §17-104; certifying to the Governor for inclusion in the annual budget the amount due to an eligible institution, *id.*, §17-105; and assuring that an institution not use money for a sectarian purpose, *id.*, §17-107. The statutory scheme provides for direct aid to institutions and contains no authority for the Commission to make payments to a student attending an eligible institution.

In *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976) (plurality opinion), this Court rejected a taxpayer challenge on Establishment grounds to the constitutionality of the statute and the disbursements of funds to four religiously affiliated institutions, three of which still receive Sellinger funds today. Although the colleges unquestionably were affiliated with a church, they were not, Justice Blackmun held, "pervasively sectarian," so that direct State aid to them did not violate the Establishment Clause. *Id.* at 758-59.

3. Decisions Below.

Columbia Union's applications for Sellinger funds were the first (and only) such requests by a religious institution since *Roemer*. Based on the funding formula under the grant program, the College sought $806,079 in state funds for core educational programs, including its mathematics, computer science, clinical laboratory science, respiratory care and nursing programs. The Commission report denying Sellinger aid to Columbia Union concluded that it is a pervasively sectarian institution under *Roemer* because, among other things, it receives over one-fifth of its revenue from the Seventh-day Adventist Church; its Bylaws require that 34 out of its 38 governing board be Church members;

and its policies require its resident students to attend three of six weekly worship services. (App. 107, 109, 115.)

In granting summary judgment to the Commission, the district court cited these facts and concluded that Columbia Union may not receive direct State aid because of the risk that, "even if designated for specific secular purposes, [such aid] may nonetheless advance the pervasively sectarian institution's religious mission." (App. 60, citing *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988).) Applying *Roemer*, *Bowen*, and *Hunt v. McNair*, 413 U.S. 734 (1973), the court found after a review of the undisputed factual record that the College's religious components are so inextricably intertwined with its secular aspects that, under the Establishment Clause, it may not receive direct state funding. (App. 61-62.)[1] For instance, the district court concluded that faculty hiring and admissions decisions do not appear to be made "without regard to religion," noting that 80% of its traditional and 20% of its evening students were Seventh-day Adventists.[2] (App. 66.)

On appeal, the Fourth Circuit concurred with the district court's legal analysis. The court first recognized the direct applicability of *Roemer*. (App. 10.) The court of appeals found that not only has this Court "never expressly overruled *Roemer*," but also that none of this Court's more recent precedents has effectively overruled *Roemer;* rather,

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[1] Contrary to Columbia Union's assertion, the district court did *not* admit that the College was less sectarian than the colleges allowed to receive aid in *Hunt* and *Tilton v. Richardson*, 403 U.S. 672 (1971). *See* Pet. at 7. The district court found: "Taken in context, the colleges at issue in *Hunt* and *Tilton* were far less sectarian than plaintiff." (App. 63.)

[2] The record does not support Columbia Union's statement that "the Catholic colleges granted funding admittedly had even higher percentages of Catholic students." Pet. at 8. The district court made no factual findings with respect to the religiously affiliated colleges that receive State aid.

they reaffirm the distinction between direct and indirect government aid. (App. 12, 20.)

The Fourth Circuit rejected the College's argument that *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), eviscerated *Roemer's* ban on direct money grants to pervasively sectarian colleges. (App. 13-15.) In particular, the court of appeals was not persuaded by Columbia Union's argument that Sellinger grants are based on the same student "private choices" that rendered the *Witters* grant to a blind pastoral student constitutional (App. 14.) "The state aid at issue here, in contrast to that in *Witters*, reaches a religious school solely as a result of a decision made by the state *not* the student." (*Id.*, citing *Witters*, 474 U.S. at 488.) (emphasis in original). This is because institutions, not students, apply for Sellinger funds and the decision to fund the institution in the first instance is exclusively the State's. (App. 15.) Moreover, unlike in *Witters*, where aid reached the school as an incidental benefit, a college under the Sellinger program is the primary beneficiary of direct aid and the student – if he benefits at all – is the incidental beneficiary. (*Id.*, citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993).)

The court of appeals next concluded that *Agostini* did not overrule *Roemer*. (App. 15-17.) Although *Agostini*, like *Witters* before it, was contrary to the broad *Roemer* dicta that "no state aid at all" to a pervasively sectarian institution is permissible, *Agostini* did not involve a situation (like the instant case or *Roemer*) "in which aid flows directly to 'the coffers of religious schools' for services provided 'on a school-wide basis.'" (App. 16, quoting *Agostini*, 117 S.Ct. at 2013.) The appeals court distinguished the remedial services "supplemental to the regular curriculum" at issue in *Agostini* from funding the entire budget for many of Columbia Union's core educational courses. (App. 17.)

Finally, the Fourth Circuit found "particularly puzzling" Columbia Union's suggestion that *Rosenberger* overruled *Roemer*. (App. 17.) To the contrary, the court of appeals

explained, "the *Rosenberger* Court took particular pains *not* to overrule *Roemer* but to carefully distinguish it." (App. 18.) While *Roemer* did not apply in a case like *Rosenberger* where a university provided an incidental or indirect benefit such as printing services, *Roemer* remains good law where a neutral state program provides direct money payments to an institution that may be engaged in religious activity. (App. 19, citing *Rosenberger*, 515 U.S. at 842.) The court of appeals noted that for Justice O'Connor, whose concurrence supplied the fifth and decisive vote, the distinction between direct and indirect aid was critical. The court pointed out that in her view the program in *Rosenberger* did not violate the Establishment Clause because funds did "not pass through the [religious] organization's coffers" and were not "a block grant to religious organizations." (App. 19, quoting *Rosenberger,* 515 U.S. at 850 (O'Connor, J., concurring).) Summarizing the body of Establishment Clause jurisprudence on this issue, the court of appeals concluded that "[t]he Supreme Court has never upheld a direct transfer of monies to a pervasively sectarian institution to fund its core educational functions." (App. 21.)

At the same time, the Fourth Circuit was unable to find as a matter of law that Columbia Union is a pervasively sectarian institution. The district court's grant of summary judgment suffered from the "fatal flaws" of resting its conclusion on an incomplete record and considering the record in the light least, rather than most, favorable to Columbia Union. (App. 33.) For example, the panel majority noted that a reasonable fact finder could find that the College's mandatory worship attendance policy reveals that Columbia Union is primarily interested in religious indoctrination at the expense of providing a secular education. (App. 26.) However, a fact finder could also infer that the policy has a limited reach and that religious indoctrination is no more than a secondary objective. (*Id.*)

Not only was the summary judgment record susceptible of conflicting inferences, but the record failed to contain essential evidence of the College's practices. (App. 36-37.)

The appeals court stressed the importance of deciding "difficult constitutional questions dependent on intensely factual determinations" on a full and complete factual record. (App. 34.) The panel majority rejected the concern of Chief Judge Wilkinson, who dissented only on the remand issue, stating that, despite his objection about the scope of such a remand, "the parties may well be able to ease these burdens by stipulating to many of the unresolved factual issues." (App. 36 n. 8.)[3]

REASONS FOR DENYING THE WRIT

Columbia Union petitions this Court to reverse twenty-three years of Establishment Clause jurisprudence barring direct state aid to pervasively sectarian institutions, even though the court of appeals vacated the judgment against it and remanded for trial the factually-based question of whether the College is pervasively sectarian, and even though this Court has just reaffirmed the very principle that Columbia Union asks this Court to review. Further review of such a question is unwarranted, particularly in the absence of a complete factual record. While Columbia Union insists that the Sellinger program does not involve direct government funding, the remand order leaves open this and many of the other material facts of this case. This Court has consistently refused to issue what amounts to an advisory opinion or to review constitutional questions where, as here, an alternative basis for decision is available. *See, e.g., Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring)("We generally await final judgment in the lower courts before exercising our certiorari

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[3] The Petition is mistaken that the court below indicated the need for "faculty testimony" to determine whether the faculty taught without fear of religious pressures. Pet. at 11. Instead, the panel majority merely cited the approach taken by the *Roemer* district court as one way of gathering evidence of a college's practices.

jurisdiction."). There is nothing exceptional about this case warranting departure from this rule.

The court of appeals also decided no novel legal issues but merely applied established precedents in holding that the district court should first consider evidence of the College's practices as well as its policies before determining whether the College is pervasively sectarian. Far from ordering an "intrusive investigation" into Columbia Union's religiosity, *see* Pet. at 13, the remand order does no more than require the parties to develop evidence in several discrete areas. Indeed, in recognition of the narrow scope of the panel majority's remand order, the district court has since decided that a two-month discovery schedule is all that will be required to supplement the record. Together with the likelihood of stipulations suggested by the court of appeals, this is scarcely the "parade of horribles" conjured by the Petition. (App. 36 n. 8.)

Nor did the court of appeals decide anything remarkable in recognizing that this Court in *Agostini* reaffirmed the *Roemer* holding just two years ago. In fact, as the court of appeals noted, this Court has never upheld a direct transfer of monies to a pervasively sectarian institution to fund its core educational functions. As *Agostini* and other cases have long recognized, government funding that directly flows to the coffers of a pervasively sectarian school to fund the entire budget for many of its programs violates the Establishment Clause. The sole exception to this principle–where student choice results in an incidental benefit to a religious institution–does not apply here because, as the court of appeals emphasized: "Institutions, not students, apply for Sellinger funds, and the State determines the eligibility of institutions, not students for the funds." (App. 15, distinguishing *Witters*, 474 U.S. at 488.) The petition should be denied, therefore, because this case presents no question meriting this Court's review.

I. THE REMAND ORDER RENDERS THIS CASE PREMATURE AND DOES NOT CONSTITUTE EXCESSIVE ENTANGLEMENT.

The court of appeals followed settled law in ordering the parties to develop a full and complete factual record before deciding a difficult constitutional question dependent on intensely factual determinations. (App. 34, citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1949).) *See also Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico,* 457 U.S. 853, 883-884 (1982) (White, J., concurring) (approving remand order because "this will result in a trial and the making of a full record and findings on the critical [First Amendment] issues."). The panel majority correctly observed that in *Bowen*, 487 U.S. at 621, this Court remanded another Establishment Clause case to the trial court for additional fact-finding to determine whether an institution was pervasively sectarian or simply "religiously inspired." (App. 35.)

While Columbia Union now claims that the remand order sanctions an excessive entanglement that violates First Amendment principles, it previously argued below that it is not pervasively sectarian and might still prevail at trial on this issue, thereby avoiding the necessity for deciding the constitutional claim it presents for review. "The most fundamental principle of constitutional adjudication is not to face constitutional principles but to avoid them, if at all possible." *United States v. Lovett*, 328 U.S. 303, 320 (1946) (Frankfurter, J., concurring). *See also Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). The College presents no sound reason for departing from this well-established principle of judicial restraint, particularly where the remand order here contemplates further proceedings. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not ripe for review by this Court."). Denying the writ does not preclude Columbia Union from raising the same issues in a later petition, after full factual

development of the record and the entry of final judgment. *Virginia Military Institute,* 508 U.S. at 946.

Review is also premature because the petition raises many disputed issues of fact to be determined by the trial court on remand. In particular, Columbia Union argues that Sellinger Program funds never flow directly to the "coffers" of any institution, but are placed in special revenue accounts to be used for specified purposes. Pet. at 27. Even the panel's dissenting judge, however, concedes that "Maryland's program provides a direct subsidy" to private institutions. (App. 45) (Wilkinson, C.J., dissenting). At the very least, this issue raises a disputed question of fact. Similarly, Columbia Union presumes that any funds it would receive under the program would be used only for secular activities. Pet. at 27. But this, too, is a question of fact which cannot be presumed at this stage of the proceedings. Even while questioning the term "pervasively sectarian," two Justices of this Court have acknowledged that "funding to pervasively sectarian institutions may impermissibly advance religion" and that it is necessary and relevant to examine how an institution "spends its grant" and whether "the funds are in fact being used to further religion." *Bowen*, 487 U.S. at 624 (Kennedy, J., with whom Scalia, J., joins, concurring). For example, whether direct state aid to an institution will "supplement" its core educational program or "supplant" educational burdens that might otherwise be borne by the institution, *see Agostini,* 117 S.Ct. at 1013, is precisely the line of inquiry contemplated by the court of appeals' remand order. The petition should be denied for these reasons alone in light of these unresolved factual issues.

Moreover, contrary to Columbia Union's argument, a court conducting this sort of examination does not engage in any excessive entanglement with religion. In fact, the panel majority found support for a list of the characteristics of a pervasively sectarian institution in seven decisions of this Court. (App. 24, citing *Roemer,* 426 U.S. at 755-58; *Hunt,* 413 U.S. at 743-44; *Tilton,* 403 U.S. at 685-86; *School*

District of Grand Rapids v. Ball, 473 U.S. 373, 384 n.6 (1985); *Meek v. Pittenger,* 421 U.S. 349, 356 (1975); *Committee for Public Educ. and Religious Liberty v. Nyquist,* 413 U.S. 756, 767-68 (1973); *Lemon v. Kurtzman,* 403 U.S. 602, 615-18 (1971).)[4]

Columbia Union is wrong, therefore, in arguing that the remand order mandates an impermissible judicial intrusion into matters of religion. Pet. at 14-16. This contention ignores not only this Court's decisions that sanction such an inquiry, but also the narrow scope of the panel majority opinion, which identified only four areas in which the record was found to be lacking:

- How traditional liberal arts or mandatory religion courses are taught at the College. (App. 27.)
- How or why the College selects its faculty, including evidence of its hiring procedures, the criteria it applies, and the nature of the applicant pool. (App. 30.)
- Whether the College has followed a religious preference in hiring for reasons other than stacking the faculty with members of the Seventh-day Adventist faith. (App. 30.)
- An analysis of the student admission and recruiting criteria. (App. 31.)

It is difficult to reconcile this limited fact-finding with Columbia Union's suggestion of an "extensive investigation into [its] religious practice." Pet. at 14. None of these areas requires the trial court to become entangled in matters involving "religious doctrine, polity and practice." *Jones v. Wolf,* 443 U.S. 595, 603 (1979) (permitting resolution of disputes involving religious institution where neutral

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[4] These characteristics include: mandatory student worship services; an express preference in hiring and admissions for church members; academic courses implemented with the primary goal of religious indoctrination; and church control over the board of trustees and financial expenditures. (App. 24.)

principles of law can be invoked). Not only does Columbia Union ignore the limited discovery period and the likelihood of stipulations in exaggerating the practical effect of the remand, it ignores that *Roemer* authorized the very examination ordered by the panel majority. (App. 36 n. 8, citing *Roemer*, 426 U.S. at 764-65.) The Petition does not even attempt to demonstrate that this aspect of *Roemer* has been superseded or otherwise merits review.

To the contrary, this Court in *Agostini* recently affirmed this aspect of *Roemer* and similarly determined that the government's review and inspection of grantee religious institutions in *Bowen* did not constitute excessive entanglement. *Agostini*, 117 S.Ct. at 2015, citing *Roemer*, 426 U.S. at 764-65 and *Bowen*, 487 U.S. at 615-17. Thus, it remains good law that the remand order may properly direct the trial court to broaden its inquiry to include evidence of Columbia Union's practices as well as its policies.

Because this Court in *Agostini* and *Bowen* has repeatedly reaffirmed that the *Roemer* inquiry does not constitute excessive entanglement, it is difficult to understand the College's reliance (Pet. at 15-16) on *New York v. Cathedral Academy*, 434 U.S. 125 (1977), a much older decision. *Cathedral Academy* merely forbade on entanglement grounds a detailed audit of a religious school's expenditures to assure that none would be used for sectarian activities. The *Roemer* issue of whether the school was pervasively sectarian was not at issue and, in fact, *Roemer* is not even cited in the decision. Nothing in *Cathedral Academy* insulates the College from routine judicial review. In *Bowen*, by contrast, the Court criticized the district court for failing to explore with "any particularity" evidence that would warrant classification of the grantees as pervasively sectarian. 487 U.S. at 620. In other words, the College's expansive reading of *Cathedral Academy* cannot survive *Bowen*.

Similarly, Columbia Union's argument that the result below discriminates among religions does not constitute excessive entanglement or otherwise warrant review by this Court. Pet. at 18-20. The *Roemer* cases require a court to distinguish between a "pervasively sectarian" institution and a "religiously affiliated" one. *Roemer*, 426 U.S. at 758-59; *see also Bowen* 487 U.S. at 621 ("It is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is religiously inspired."). As Justice O'Connor recognized in *Rosenberger*, resolving Establishment Clause cases requires "sifting through the details" and making a fact-based judgment. *See* 515 U.S. at 847 (O'Connor, J., concurring) ("Such judgment requires the courts to draw lines, sometimes quite fine, based on the particular facts of each case."). The Catholic colleges that receive Sellinger funds were required to present the same kind of evidence Columbia Union now claims constitutes proof of an intrusive and discriminatory procedure. But no denominational preference results simply because the College may in the future fail to persuade the district court that it is on one side of the line instead of the other.

Finally, this Court long ago rejected the argument that the remand order places on Columbia Union unconstitutional pressure to disavow its religious beliefs. *See* Pet. at 20-21. "A refusal to fund protected activity, without more, cannot be equated with a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980). Thus, this Court has refused to find that First Amendment rights are not fully realized unless subsidized by the State. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983). Far from imposing on the College an unconstitutional condition on the receipt of funds, the panel majority's analysis simply assures that no public monies are spent on religious indoctrination. (App. 37.) In sum, the remand order has a rational basis and is not "aimed at the suppression of dangerous ideas." *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 407 (1984) (Rehnquist, J. dissenting), quoting *Cammarano v. United*

States, 358 U.S. 498, 513 (1959). Nowhere does the Petition attempt to show that these precedents require review.

II. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S ESTABLISHMENT CLAUSE PRECEDENTS AND PRESENTS NO CONFUSION OR CONFLICT AS TO THE APPROPRIATE LEGAL STANDARD.

Review is also unwarranted because the court of appeals decided nothing exceptional in unanimously agreeing that the *Roemer* line of cases prohibiting direct state funding of a pervasively sectarian institution provides the appropriate legal standard in this case. (App. 10) ("We begin our inquiry recognizing the direct applicability of *Roemer.*"); (App. 47) (Wilkinson, C.J., dissenting)("*Bowen, Roemer,* and *Hunt* remain the law and they require this court to uphold Maryland's denial of funding to Columbia Union if it is a pervasively sectarian institution."). That standard prohibits the direct transfer of public monies to fund the core educational functions of a pervasively sectarian institution. There is no merit in Columbia Union's argument that this pervasively sectarian analysis is "constitutionally suspect." Pet. at 23.

The panel majority correctly recognized that Columbia Union's argument is fatally flawed by its refusal to acknowledge that this Court's recent Establishment Clause cases–*Agostini*, *Rosenberger*, and *Witters*– not only fail to overrule *Roemer*, but "reaffirm[ ], as the Court has on many other occasions, the distinction between direct and indirect government aid." (App. 20.) Thus, the court of appeals was careful to establish that the "state aid at issue here, in contrast to that in *Witters*, reaches a religious school solely as a result of a decision 'made by the state' *not* the student." (App. 14, quoting *Witters,* 474 U.S. 488).

Contrary to Columbia Union's argument that this distinction is a mere formality, Pet. at 24, the panel further explained that under the Maryland program (1) institutions, not students, apply for State funds, (2) the State determines the eligibility of institutions, not students, for the funds, (3) although the amount of funds given to an institution is tied to the number of students attending it, the decision to fund the institution in the first instance is exclusively the State's, and (4) the State pays such funds directly to an institution. (App. 15.) The court of appeals recognized that these distinctions are at the heart of Establishment Clause values equating the direct transfer of public monies to religious activities with "affirmative involvement characteristic of outright government subsidy." (App. 20-21, quoting *Nyquist,* 413 U.S. at 774, 806-07 (Rehnquist, J., concurring in part and dissenting in part) (other citations omitted).)

The court below also properly distinguished *Committee for Public Education v. Regan,* 444 U.S. 646 (1980), as a case not involving the provision of direct aid to the core educational functions of a religious school. (App.17.) Columbia Union is therefore mistaken that in *Regan* the Court abandoned its established prohibition on direct state aid to pervasively sectarian institutions. Pet. at 24. Instead, that decision upheld reimbursement to parochial schools only for costs and expenses incurred in administering and grading state-sponsored and mandated standardized testing separate and apart from, and thus supplemental to, the parochial school's educational program. (App. 17, citing 444 U.S. at 656.) Such reimbursements resembled the Title I remedial services at issue in *Agostini* that did not advance the religious mission of the institution, were "supplemental to the regular curricula" taught to all students, and did not "supplant" or "reliev[e] sectarian schools of costs they otherwise would have borne in educating their students." (App. 17, quoting *Agostini*, 117 S. Ct. at 1013 (quoting *Zobrest,* 509 U.S. at 12).) *See also* App. 18, citing *Rosenberger,* 515 U.S. at 842 ("The *Rosenberger* Court [also] expressly found that *Roemer* did not apply where the

University provided an 'incidental,' indirect benefit (i.e., printing services) for all qualifying recipients, *not* 'direct money payments' as was provided to the colleges in *Roemer.*")(emphasis in original).

In addition to its failure to show how the Fourth Circuit decision is in any way inconsistent with this Court's precedents, Columbia Union has also failed to identify a conflict between the decision below and other court of appeals decisions. *See* Pet. at 16-18. Indeed, neither *Hartman v. Stone*, 68 F.3d 973 (6th Cir. 1995), nor *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996), even involves the applicability of *Roemer* or the ban on direct State aid to a pervasively sectarian institution. Thus, neither decision conflicts with the court of appeals' decision in the instant case.

In contrast to the instant case, in *Hartman* the Sixth Circuit stated that the Establishment Clause was not directly at issue because the benefits provided were inconsequential. *See* 68 F.3d at 982 ("[A]n examination of the alleged benefits in this case leads us to conclude that they lack sufficient substance to warrant constitutional concern."). In that case, the Army issued regulations prohibiting on-base family child care providers from engaging in religious practices while providing day care services. The Sixth Circuit not only held that the regulations violated the providers' free exercise of religion but also found that the benefits conferred on the providers were either too indirect or too insubstantial to raise Establishment Clause concerns. *Id.* By contrast, the court of appeals in the instant case summarized the issue here as "the Establishment Clause implications of a 'neutral [state] program' providing 'direct money payments to an institution' that may be 'engaged in religious activity.'" (App.19, quoting *Rosenberger*, 515 U.S. at 842.)

Similarly, *Catholic University* does not conflict with the decision below because it provides no support to Columbia Union's argument that the civil courts lack jurisdiction to

inquire into matters of religion. Pet. at 18. There, the District of Columbia Circuit merely applied governing law in deciding that excessive entanglement occurs where a government agency investigates a sectarian college's decision to deny tenure to a professor of canon law. That tenure decision was not reviewable by the courts, according to the concurring judge, because it required the court to preempt the decision-making authority of the Vatican. 83 F.3d at 476 (Henderson, J. concurring). On the other hand, "that a sectarian institution can take secular, and therefore reviewable, action has long been recognized by many courts, including ours." *Id.* at 473 (citations omitted). Ironically, Columbia Union first asked the courts to redress the denial of its State aid, even though it now claims the courts are incompetent to finally resolve its suit. Columbia Union plainly took secular action when it applied for Sellinger funds and instituted this action; it may not escape judicial review simply because of its religious affiliation.[5]

Similarly misplaced is Columbia Union's argument that the decision below conflicts with *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 119 S.Ct. 496 (1998), and that the latter case erases the profound distinction between direct aid to a pervasively sectarian institution as opposed to students or parents. *See* Pet. at 26. On the contrary, *Jackson* confirms the absence of any conflict requiring this Court's intervention. The Supreme Court of Wisconsin emphasized that the voucher program at issue was necessarily amended to comply with the constitutional principles of *Agostini* and *Witters*. The original voucher program found constitutionally infirm provided direct grants to pervasively

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[5] In *Catholic University* the sectarian nature of the institution was not at issue. Under Title VII the courts routinely determine whether the defendant is sufficiently religious to qualify for an exemption under 42 U.S.C. § 2000e-1(a) as a "religious corporation, association, educational institution or society." *See e.g., Killinger v. Samford University*, 113 F.3d 196 (11th Cir.1997).

sectarian schools. Under the amended program, which was upheld by the court, "aid flows to sectarian private schools only as a result of numerous private choices of the individual parents of school-age children .... [T]he program was amended so that the State will now provide the aid by individual checks made payable to the parents." 578 N.W.2d at 618.

Moreover, the Wisconsin court concluded that, consistent with the precedent of this Court, "not one cent flows from the State to a sectarian private school ... except as a result of the necessary and intervening choices of individual parents." 578 N.W.2d at 618. The result was as this Court intended, wherein "[n]o reasonable observer is likely to draw from [these facts] an inference that the State itself is endorsing a religious practice or belief." *Id.*, quoting *Witters*, 474 U.S. at 493 (O'Connor, J., concurring).

The Wisconsin case, like *Agostini* before it, serves to affirm the *Roemer* distinction between direct and indirect government aid. The facts before that court, unlike *Roemer* and the instant case, did not involve the unique situation where "aid flows directly to 'the coffers of religious schools' for services provided 'on a school-wide basis.'" (App. 16, quoting *Agostini*, 117 S. Ct. at 2013.) As the panel in the instant case carefully reasoned, *Agostini* holds that "government aid flowing to even a pervasively sectarian institution does not impermissibly advance religion if it reaches the institution as a result of private independent choices of the individual rather than state decisionmaking, and if it 'supplements' rather than 'supplant[s]' the colleges core educational functions." (App. 17) (emphasis in original).

It is equally clear that neither *Agostini* nor the Wisconsin case hold that direct state funding that flows to the coffers of a pervasively sectarian institution to fund the budget of an institution's core educational courses would pass constitutional muster. (App. 17.) The central teaching of *Roemer* remains undisturbed: "when a college is so

pervasively sectarian that its religious mission 'permeates' its educational functions, the government cannot provide direct money grants even to fund the college's secular subjects because 'religious and secular function [a]re inseparable.'" (*Id.*, quoting *Roemer*, 426 U.S. at 750.)

In light of this Establishment Clause precedent and absent any conflict of judicial decisions, Columbia Union is left with little support for certiorari review. As an alternative, it even suggests that the sovereign State of Maryland is constitutionally obligated to abrogate the intent of the Sellinger program–direct support for private institutions of higher education–by turning it into a financial aid program for individual students.[6] Pet. at 25. In the end, its analysis does not justify review by this Court. The legal issues in the instant case were appropriately disposed of by the panel below, carefully and analytically following the precedent placed before it. This Court's jurisprudence remains intact. Without a sufficient factual record at hand, the consideration of a dramatic departure from such jurisprudence is best left for another day.

CONCLUSION

For the reasons stated, the petition should be denied.

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[6] The panel majority recognized that ordering the State to provide Sellinger funds directly to students is not more narrowly tailored than "simply denying funds to the one affected institution and permitting the statute, which otherwise operates within the bounds of the Constitution, to stand." (App. 9 n.2.)

Respectfully submitted,

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